

The claimant was employed as a janitor by respondent. On June 13, 2003, as the claimant was walking to the front of the store he observed a piece of gum on the floor. Another employee, Sara Dice, was talking on the phone and had her back to claimant. It appeared to claimant that she was going to step on the gum so claimant tapped her on the shoulder to prevent her from stepping on the gum. Ms. Dice responded by turning around and angrily pushing claimant while trying to kick him. Claimant then walked away.

In a written statement, Ms. Dice indicated that while she was on the phone with a customer the claimant came up behind her and poked her while yelling at her. She told him to stop and she tried to kick him. She told him to leave her alone and he then left her work area.

Claimant testified that a short time later he returned and as he passed Ms. Dice he told her to keep her feet on the floor. Claimant said Ms. Dice responded by saying something to claimant and then pushed him. Claimant said he then tapped Ms. Dice and she came at him with a pen. As claimant tried to get out of the way he struck a display with his shoulder.

In her written statement Ms. Dice indicated that when claimant returned she poked him on the shoulder and told him to leave her alone. She was then again on the phone and claimant came back and poked her so she shoved him into the display.

The ALJ determined the altercation between claimant and his co-worker was the result of an argument over the performance of work. The ALJ's Order noted in part:

Claimant did suffer an accidental injury. Claimant's alleged accidental injury did arise out of and in the course of employment.

Altercations between workmen, resulting in injuries, usually do not arise out of employment, and generally will not be compensable. *Addington v. Hall*, 160 Kan. 268, 160 P.2d 649 (1945); *Romerez v. Swift Co.*, 106 Kan. 844, 189 P. 923 (1920).

However, an injury sustained by an employee during an assault arises out of the employment when it arises out of the nature, conditions, obligations, and incidents of employment in the same manner as any other injury. *Springston v. IML Freight, inc.*, 10 Kan. App. 2d 501, 704 P.2d 394 (1985). It is generally accepted that, if an assault grows out of an argument over the performance of work, the injury is compensable. 1 *Larson's Workers Compensation Law*, Sec. 11.12(b). A battery suffered at the hands of a fellow employee regarding a work-related disagreement is compensable. *Brannum v. Spring Lakes Country Club, Inc.*, 20 Kan. 658, 455 P.2d 546 (1969)

Claimant's injury stemmed from a pushing incident in which he was attempting to remove gum from the floor. "But for" the gum incident, his accidental injury would not have occurred.

The Board agrees with and adopts the ALJ's analysis. The incident began with claimant attempting to remove the gum from the floor. He was trying to perform his work and as he tapped Ms. Dice on the shoulder she perceived his actions as disrupting the performance of her work. Moreover, it is clear Ms. Dice's actions were the result of her anger at claimant interrupting her in the performance of her work.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Brad E. Avery dated August 14, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2003.

BOARD MEMBER

c: Timothy J. Pringle, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director